E-132, 299/SA-90-1077 ORDER DENYING PETITION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner
Norma McKanna	Commissioner
Patrice M. Vick	Commissioner

In the Matter of a Petition by the City of Rochester, Minnesota, for an Order Establishing Petitioner's Right to Provide Electric Service to Certain Street Lights Constructed and Owned by Petitioner and Located in the City of Rochester Adjacent to Highway 63 North, in the Service Territory of People's Cooperative Power Association

ISSUE DATE: March 15, 1991

DOCKET NO. E-132, 299/SA-90-1077

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PROCEDURAL HISTORY

On December 7, 1990 the City of Rochester (the City) filed a petition requesting authorization to provide electric service to some 52 street lights within the assigned service area of People's Cooperative Power Association (People's). The City claimed a right to serve the street lights under Minn. Stat. §§ 216B.42, subd. 2 and 455.01 et seq. (1990), as well as under general legal principles allowing individuals and other legal entities to produce their own electricity instead of purchasing it.

People's opposed the City's petition, claiming People's had the exclusive right to serve the 52 street lights. People's also claimed the City had violated its service area by constructing electric facilities to serve the lights and asked the Commission to refer the alleged violation to the Attorney General for penalty proceedings under Minn. Stat. § 216B.54 et seq.

The Department of Public Service (the Department) filed comments opposing the City's petition and stating it would be proper for the Commission to consider a referral for penalty proceedings.

The matter came before the Commission on January 30, 1991.

FINDINGS AND CONCLUSIONS

The City claimed a right to serve street lights within People's' assigned service area under Minn. Stat. § 216B.42, subd. 2 (1990); under Minn. Stat. §§ 455.01 et seq. (1990); and under the generally recognized right to produce electricity for one's own

consumption. For the reasons set forth below, the Commission rejects the City's claims.

The City's Claims Under Minn. Stat. § 216B.42, subd. 2 (1990)

Since 1974 Minnesota electric utilities have had assigned service areas, where they have exclusive service rights and a concomitant duty to serve. Minn. Stat. §§ 216B.37 through 216B.44 (1990). Utilities may provide service outside their assigned service areas only in a few narrowly defined situations. One of these situations is when a utility wishes to serve "its own utility property and facilities" within another utility's service area. Minn. Stat. § 216B.42, subd. 2 (1990). The City claims that the street lights at issue are "its own utility property and facilities." The Commission disagrees.

One problem at the outset is that, in this case, there is no such thing as "utility property and facilities," if that phrase were interpreted to mean "utility-owned property and facilities." The Rochester municipal utility is not a separate legal entity; it is a division of the City. It owns no property in its own right; all property connected with it in any way is owned by the City. Since the Commission does not consider ownership the determinative factor, however, the inquiry in this case does not end there.

The statutory language at issue is very specific and limits extra-territorial service rights to a utility's "own utility property and facilities," emphasis added. The Commission assumes the legislature used this degree of detail deliberately and that the word "utility" must be given full effect. It would have been a simple matter for the legislature to allow a utility to cross service area boundaries to serve "its own property and facilities." Instead, the legislature chose to limit a utility's extra-territorial service rights to "its own utility property and facilities," emphasis added. The use of the word "utility" clearly demonstrates an intent to limit the right to serve. The legislature was making it clear, for example, that the right did not extend to business ventures undertaken as part of a utility's diversification program.

The next question, of course, is what the term "utility" means in this context. The Public Utilities Act defines both "utility" and "electric utility." Central to both definitions is the provision of electric (or natural gas) service at retail:

> "Electric utility" means persons, their lessees, trustees, and receivers, separately or jointly, now or hereafter operating, maintaining or controlling in Minnesota equipment or facilities for providing electric service at retail . . .
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> Minn. Stat. § 216B.38, subd. 5 (1990).
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> "Public utility" means persons, corporations or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling

> in this state equipment or facilities for furnishing at retail natural, manufactured or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof . . .
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> Minn. Stat. § 216B.02, subd. 4 (1990).

The Commission concludes that "utility property and facilities" are property and facilities used to provide electric service at retail, i.e., power plants, substations, corporate headquarters, and other property without which a utility could not provide electricity to its customers. "Utility property and facilities" does not include property and facilities used for purposes other than producing and delivering power, such as street lights, general municipal property, or property used in unregulated business ventures.

The City claims that street lighting should be viewed as a utility function for two additional reasons. The first is that street lighting was one of the primary purposes for which the municipal utility was founded. Although the safety and convenience provided by electric street lights no doubt acted as a powerful incentive for electrification in 1892, when the municipal utility was created, that does not make street lights "utility property and facilities" within the meaning of the statute.

Second, the City argued that its internal accounting practice of assigning capital costs associated with street lighting to its municipal utility demonstrated that the lights were "utility property and facilities." While this may be a rational internal accounting practice, that does not make street lights property or facilities used to provide retail electric service, the statutory definition of "utility." The Commission does not believe the municipal utility's understanding of its historical origins or the City's internal accounting procedures would justify disregarding the clear language of the statute.

The City's Claims Under Minn. Stat. §§ 455.01 et seq.

The City also claimed a right to serve the street lights under Minn. Stat. chapter 455, which sets forth financial, procedural, and operational requirements for municipal electric utilities. The City claimed chapter 455 evidenced "nearly a century of plainly stated legislative intent that a city desiring to do so may illuminate its own streets with its own lights and its own electricity." Petitioner's Memorandum, page 4. This argument rested in large part on the fact that, until 1976, the introductory section of that chapter contained an explicit reference to street lighting:

> Each city of the second class or the third class in the state is hereby authorized and empowered, by an affirmative vote of two-thirds of all the members of its council, to construct, erect, or purchase an electric light plant to be operated by the city for the lighting of its public streets, alleys, lanes, parks, and public grounds, and for such other municipal purposes and uses requiring light or power, as the council of the city may direct; and for such use and benefit of the inhabitants of the city, and upon such conditions as the council of the city may prescribe from time to time by ordinance.
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> Minn. Stat. § 455.01 (1975).

In 1976, however, the legislature amended the statute and removed the reference to street lighting. The statute now reads as follows:

> Each home rule charter city of the second or third class, by an affirmative vote of two-thirds of all the members of its council, may construct, or purchase an electric light plant to be operated by the city for municipal purposes and for the use and benefit of the inhabitants of the city.
>
> Minn. Stat. § 455.01 (1990).

The Commission is unconvinced that the statute's former reference to street lighting demonstrates legislative intent to allow municipal utilities to serve street lights within other utilities' assigned service areas. A more reasonable interpretation is that it demonstrates legislative recognition, in 1901, that the public benefits of electrification, especially electric street lighting, were substantial enough to justify municipal acquisition or construction of electric plants.

Finally, the legislature has made it clear, both in chapter 455 and in the Public Utilities Act, that the Public Utilities Act is the final authority on all issues within its purview:

> Laws 1974, chapter 429 [the Public Utilities Act] is complete in itself and other Minnesota statutes are not to be construed as applicable to the supervision or regulation of public utilities by the commission. All acts and parts of acts in conflict with Laws 1974, chapter 429 are repealed insofar as they pertain to the regulation of public utilities as defined herein.
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> Minn. Stat. § 216B.66 (1990).

Similarly, chapter 455 itself explicitly subjects service extensions by municipal utilities to the requirements of the Public Utilities Act. Minn. Stat. §§ 455.26, .29, and .32 (1990). The Commission therefore rejects the City's argument

that Minn. Stat. chapter 455 authorizes it to serve street lights in People's' assigned service area.

The City's Claim of Inherent Authority to Consume its Own Power

The City also claimed a right to serve the street lights under the generally recognized right to produce electricity for one's own consumption. The City pointed out that some businesses and professional associations within its service territory (notably, the Mayo Clinic) generate their own electricity. The City believed it could serve the street lights under the same principle. The City also claimed Minnesota had adopted public policies encouraging self-generation. The Commission rejects both claims.

First, the right to generate and consume one's own electricity is not what is at issue. Persons, corporations, and other legal entities are free to generate and consume their own electricity without regard to assigned service area boundaries, as long as they provide power to themselves alone. If they furnish retail electric service to the public, however, they become public utilities subject to the terms and conditions of the Public Utilities Act. Minn. Stat. § 216B.02, subd. 4 (1990).[1] Since the City of Rochester obviously furnishes retail electric service to the public, it is subject to the Act, and is prohibited from providing service outside its assigned service area. Minn. Stat. §§ 216B.37 and 216B.40 (1990).

Second, the City is mistaken in its assertion that state policy encourages self-generation. The statute it cites for that proposition, Minn. Stat. § 216B.164 (1990), provides in relevant part as follows:

> This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public.
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> Minn. Stat. § 216B.164, subd. 1 (1990).

Cogeneration and small power production are not synonyms for self-generation. They are processes by which self-generators sell energy to public utilities for retail sale to the public. What the statute seeks to encourage is the development of new cost-effective means of producing electricity, for eventual sale to the public at retail. It does not encourage self-generation.

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[1] Municipal utilities and cooperatives are exempt from many of the Act's requirements. What brings them under the Act in the first place, however, is the fact that they furnish retail electric service to the public.

Finally, the City claimed that the sale of electricity by one unit of city government to another is not a retail transaction and is therefore not subject to the assigned service area statutes.[2] The Commission disagrees. It is true that the Public Utility Act's definition of electric service is limited to service provided at retail. The term "retail," however, clearly includes transactions like the one at issue, and is used primarily to make it clear that the Act is not attempting to regulate wholesale electric service, which is subject to federal regulation. The statutory definition reads as follows:

> "Electric service" means electric service furnished to a customer at retail for ultimate consumption, but does not include wholesale electric energy furnished by an electric utility to another electric utility for resale.
>
> Minn. Stat. § 216B.38, subd. 3 (1990).

This understanding that "retail" refers to service to the ultimate consumer, as opposed to sales to merchants, is echoed in the dictionary definition, "the sale of goods or commodities in small quantities to the consumer." The American Heritage Dictionary, Second College Edition, (Boston: Houghton Mifflin Company, 1985). The Commission concludes that "retail" electric service means electric service to the ultimate consumer, as opposed to sales to a middleman, and that the service at issue qualifies as retail service under the statute.

The Claim of Absurd Results

Finally, the City claimed it would be absurd to require the City to purchase power for the street lights from People's at a price allegedly higher than that charged by its own municipal utility. The City argued that any additional cost to taxpayers would outweigh any benefit from honoring service territory boundaries. Finally, the City argued it would defeat one of the purposes of assigned service areas, to promote the development of economical electric service throughout the state.

The Commission has faced this issue before, in the context of requests to change service area boundaries due to rate differentials. The Commission has consistently held that extreme caution is necessary when considering restricting a utility's right to serve on the basis of rate differentials. The reasons for this policy are set forth in the following excerpt from an earlier Order:

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[2] The City declined to characterize the utility's provision of service to street lights as a "sale," but did concede the city debited general revenues and credited utility revenues for the electricity provided.

> As to the previous rate differential, the Commission reiterates its longstanding position that rate differences do not by themselves constitute good cause for adjusting service areas. Utility rates vary according to complex and interrelated factors, such as economic conditions at the time major investments were required, rates of growth in the utility's service area, fuel source proximity, and other factors. These factors affect utilities in different ways at different times, making rate discrepancies normal. Over time, every utility's rates will vary in relation to those of other utilities.
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> To adjust service areas to reflect these rate differences would be self-defeating. It would cause rates to be even higher for displaced utilities, which would have fewer customers from whom to recover their fixed costs. It would be unfair to the captive customers remaining on their systems. It would cause frequent disruptions in established service arrangements, since the identity of the utility with the lowest rates would constantly change. Even more seriously, however, it would undermine the stability assigned service areas were established to achieve.
>
> In the Matter of the City of White Bear Lake's Request for an Electric Utility Service Area Change Within its City Limits, Docket No. E-101, E-002/SA-88-179 (E62-01), ORDER AFTER REMAND (April 12, 1990), at 11.

In the same Order, the Commission summarized its long-held and often-articulated commitment to service area stability:

> As the Commission has noted before, service area stability is essential for the orderly provision of reliable electric service throughout the state. The generation, transmission, and distribution of electricity is an extremely capital-intensive business. Utilities must be willing and able to commit large amounts of capital to building and maintaining the facilities necessary to deliver power within their service territories. Since power plants require years of planning and construction, utilities must also be willing to commit these resources years in advance of actual need. They do this in reliance on carefully drawn long range plans.
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> Without stable service areas, long range planning by utilities would be meaningless. They would have little incentive to commit current resources to meet future need, and the public would have little right to require it. That is why the legislature considered exclusive service territories essential to the development of economical, efficient, and adequate electric service throughout the state.
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> In the Matter of the City of White Bear Lake's Request for an Electric Utility Service Area Change Within its

City Limits, Docket No. E-101, E-002/SA-88-179 (E62-01), ORDER AFTER REMAND (April 12, 1990), at 11.

The Commission believes that the same considerations apply in this case. The benefits of maintaining exclusive service rights within assigned service areas outweigh any benefit which would result from allowing the City to obtain currently lower cost service from the municipal utility.

People's' Request for Penalty Proceedings

People's asked the Commission to refer the City's construction of electric facilities to serve the street lights to the Attorney General for penalty proceedings. The Commission finds a referral unnecessary.

The City properly stopped providing service to the street lights as soon as it learned that People's challenged its right to serve. It brought the matter before the Commission itself. It refrained from providing further service pending a Commission determination. The obvious good faith this conduct demonstrates makes it unnecessary to invest further resources in penalty proceedings. The Commission will deny People's' request for a referral to the Attorney General.

ORDER

1. The City of Rochester's December 7, 1990 petition for authorization to serve certain street lights within the assigned service area of People's Cooperative Power Association is denied.

2. People's Cooperative Power Association's January 7, 1991 request for an Order referring the City's alleged violation of its assigned service area to the Attorney General for penalty proceedings is denied.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)